



This Award includes findings and conclusions by the Administrative Law Judge related to two separate claims for injury. For an accident of February 7, 1991 claimant alleges carpal tunnel syndrome in the right upper extremity. For injury of December 16, 1991 claimant alleges bilateral carpal tunnel syndrome. The Special Administrative Law Judge awarded benefits based upon 7.7% permanent partial impairment of function of the right upper extremity for the first injury and awarded fifty-five percent (55%) permanent partial general disability for a work disability from the second injury. The Special Administrative Law Judge also assessed fifty percent (50%) of the Award on the second injury against the Kansas Workers Compensation Fund. Respondent asked the Appeals Board to review the findings and conclusions by the Special Administrative Law Judge relating to the nature and extent of the second injury and Fund liability. The Appeals Board adopts the findings and conclusions by the Special Administrative Law Judge on all other issues, including the finding that claimant has a 7.7% disability to her right upper extremity for the first injury.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the record and considering the arguments of the parties, the Appeals Board finds:

(1) For the second injury, the injury of December 16, 1991, claimant is entitled to benefits based upon five percent (5%) permanent partial impairment of the left upper extremity.

Claimant began having symptoms to her right upper extremity in 1990. Dr. J. Mark Melhorn performed a right carpal tunnel release in April of 1991. He released her to return to work without restrictions in May 1991. After her return to work, claimant continued having problems with her right and also developed symptoms in her left upper extremity. Because of the continuing problems she was referred to Dr. Tyrone Artz. Dr. Artz's records indicate through July 19, 1991 claimant complained only of symptoms on the right. Claimant began thereafter to have symptoms on the left which were eventually also diagnosed as carpal tunnel syndrome.

The Administrative Law Judge apparently concluded claimant developed additional permanent disability on the right, as well as, carpal tunnel syndrome on the left after surgery on the right. For the second injury he awarded benefits for bilateral carpal tunnel syndrome and a resulting work disability of fifty-five percent (55%). The Appeals Board finds, however, that the second injury was to claimant's left upper extremity only and should be treated as a scheduled injury. Dr. Jay Stanley Jones examined claimant on July 29, 1992 by referral from claimant's attorney. He testified that he could not substantiate any additional permanent injury to the right following the surgery. Dr. George Lucas gave a similar opinion. He concluded there were recurrent symptoms on the right, but indicated that in his opinion return to work probably did not cause her to have more symptoms on the right. He, likewise, did not find that there was any new injury on the right following surgery.

Dr. Jones gives her a rating of five percent (5%) permanent partial impairment to the left upper extremity. He then indicates that he would be speculating on the left because she has not had surgery and anything could yet happen. Dr. Lucas rates the left hand at five percent (5%). His rating suggests that he may be rating only the hand, not the upper extremity. Based upon the record as a whole, the Appeals Board finds and concludes that claimant has not established a simultaneous injury but has, instead, established two

separate injuries. The first, as indicated, was the basis of an Award of seven and seven tenths percent (7.7%) impairment to the right upper extremity. For the second injury, the one subject to this appeal, the Appeals Board finds claimant suffered a five percent (5%) permanent partial impairment of the left upper extremity. See Tovar v. IBP, Inc., 15 Kan. App. 2d 782, 817 P.2d 212, rev. denied 249 Kan. 778 (1991).

(2) The Workers Compensation Fund should be liable for all of the benefits awarded for the second injury, the injury of December 16, 1991. The evidence clearly establishes that respondent knew of claimant's right arm injury. Respondent authorized and was aware of the surgery done on the right. Respondent was also aware of continuing problems on the right upon return to work and made various attempts at accommodating that condition. Where a second injury would not have occurred but for the pre-existing impairment, the Workers Compensation Fund is liable for all of the payments on that second injury. See K.S.A. 1991 Supp. 44-567. Dr. Jones testified that it is probably more true than not that this injury to the left would not have happened if claimant had not previously injured her right upper extremity. Dr. Jones' testimony provides the only evidence on this question and since it is not unreasonable, the Appeals Board adopts that testimony and finds that the second injury most likely would not have occurred but for the first. The Fund is, therefore, liable for the benefits paid on the second injury.

### **AWARD**

WHEREFORE, the Appeals Board finds and concludes that the Award of Special Administrative Law Judge William F. Morrissey dated June 29, 1994 should be, and the same is, modified. An award of compensation is hereby made and entered in accordance with the above findings in favor of the claimant, Sandra F. Depew, and against the defendant, NCR Engineering & Manufacturing, and the insurance carrier, American Guaranty & Liability Insurance Company, for an accident of February 7, 1991 and based upon an average weekly wage of \$441.00 for 5 weeks temporary total disability compensation at the rate of \$278.00 per week in the sum of \$1,390.00 and 15.78 weeks of compensation at the rate of \$278.00 per week in the sum of \$4,386.84 for 7.7% permanent partial impairment of function of the right upper extremity, making a total award of \$5,776.84, all of which is past due and owing and which is ordered paid in one lump sum, less compensation heretofore paid for this injury.

Medical expenses incurred by the claimant through the May 24, 1991 follow-up visit with Dr. Melhorn are ordered paid as part of the first accident claim.

FURTHER AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Sandra F. Depew, and against respondent, NCR Engineering & Manufacturing, and the insurance carrier, Liberty Mutual Insurance Company, and the Kansas Workers Compensation Fund for an accidental injury which occurred by a series of events culminating December 16, 1991 and based upon an average weekly wage of \$528.81 for 71.57 weeks temporary total disability compensation from December 16, 1991 through July 9, 1993 at the rate of \$289.00 per week, in the sum of \$20,683.73 and 6.9 weeks permanent partial disability compensation at the rate of \$289.00 per week in the sum of \$1,994.10 for a 5% permanent partial disability to the left upper extremity, making a total award of \$22,677.83.

Future medical benefits will be awarded only upon proper application to and approval of the director. Unauthorized medial expense of up to \$350.00 is ordered paid to or on behalf of the claimant upon presentation of proof of such expense.

All compensation, medical expenses and costs are to be borne one-half by the respondent and Liberty Mutual Insurance Company and one-half by the Kansas Workers Compensation Fund.

Claimant's attorney fee contract is hereby approved insofar as it is not inconsistent with K.S.A. 1991 Supp. 44-536.

Fees necessary to defray the expenses of administration of the Workers Compensation Act are hereby assessed one-half to the respondent and one-half to the Kansas Workers Compensation Fund to be paid direct as follows:

William F. Morrissey Special Administrative Law Judge	\$150.00
Barber & Associates Transcript of Regular Hearing	\$222.30
Don K. Smith & Associates Deposition of Jay Stanley Jones, M.D.	Unknown
Deposition of George Lucas, M.D.	\$324.00
Deposition of Don Vander Vegt	\$416.00
Deposition of Sandra Depew	\$811.50
Alexander Reporting Co. Deposition of Jim Ogden	\$193.35

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of July 1995.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Norman I. Cooley, Wichita, KS  
Douglas D. Johnson, Wichita, KS  
J. Darin Hayes, Wichita, KS  
Vincent L. Bogart, Wichita, KS  
William F. Morrissey, Special Administrative Law Judge

**SAUNDRA F. DEPEW**

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**DOCKET NO. 165,404**

David Shufelt, Acting Director